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No. 96-928

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

WELLS FARGO BANK, N.A.,
Petitioner,
v.
THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF

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REPLY BRIEF

The objections that the Opposition offers to a grant of certiorari are not substantial.

1. The Opposition recognizes that in assessing contract damage claims against the United States, the Federal Circuit applies a flat rule that as a matter of law "lost profits on collateral transactions . . . [are] denied . . . ." Opp. at 7. The Opposition does not dispute that this limitation is unique in American law: it does not apply in cases between private parties (and no other court applying the Federal Circuit's rule has been found), it is not founded on common law rule, and it is contrary to the Restatement of Contracts and to leading scholarly treatises. Pet. at 15-18.

Thus, the government does not dispute the correctness of the first argument in the Petition—that the rule of decision announced by the Federal Circuit in this case

"departs from otherwise universally applied doctrine." Pet. at 15. In so creating a major limitation of the damages available against the United States—a limitation that does not apply in cases involving private parties—the Federal Circuit holding is in clear conflict with this Court's long-standing doctrine that "When the United States . . . makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. There is no difference . . . except that the United States cannot be sued without its consent." *Perry v. United States*, 294 U.S. 330, 352 (1935).

2. The Opposition asserts that the conflict with this Court's holdings does not exist because, it claims, the Federal Circuit said that its unique limitation of damages against the United States was a part of a holding that the excluded damages were not "foreseeable." Opp. at 8. This assertion is merely semantic, however. First, putting the overall category of foreseeability aside, the government does not dispute that other courts allow (and scholarly authorities approve) as damages what the Federal Circuit excludes: damages for losses on so-called unrelated contracts. That is a conflict between the Federal Circuit rule and that applicable to private parties generally.[1]

Moreover, it is clear that the term "foreseeable" means something quite different to the Federal Circuit than to other courts, scholars, and drafters of the Restatement. As pointed out in the Petition (at 12) the Federal Circuit rejected the conclusion of the trial court that the proper test to apply was the conventional test of foreseeability[2]

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[1] The government's assertion that no conflict exists because no case has been found that precisely replicates the facts of the present case (Opp. at 10) does not require a response.

[2] It has never been disputed that the trial court, the Court of Federal Claims, purported to apply, and correctly applied, the foreseeability test as that doctrine is expressed in the Restatement and generally applied in courts in the United States. Indeed,

("As our prior discussion shows, we approach the question differently . . ."; Pet. App. 22a). Accordingly, while the Federal Circuit does state that Wells's lost profit damages were unforeseeable (Pet. App. 22a, 23a), that conclusion is clearly based on its unique doctrines that losses in third party transactions are automatically, as a matter of law, deemed "remote," "uncertain," and occurring only after an "intervening causal step" of a supposedly unrelated collateral contract.[3] Pet. App. 21a, 22a. As we demonstrated in the Petition (at 16-18), other jurisdictions allow the recovery of the kind of damages that the Federal Circuit excludes, where (as in the present case) there is a factual showing that the damage was reasonably foreseeable.[4]

3. The Opposition (at 7-8) also asserts that because the Federal Circuit and its predecessor the Court of Claims have denied "lost profits on collateral transactions . . . for at least a century . . ., [Wells Fargo] could not reasonably have expected that such profits would be

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Chief Judge Smith's opinion provided a substantial and scholarly analysis. *See* Pet. App. 38a-43a, 52a-53a.

[3] The "intervening causal step" language is based on language in the opinion in *Myerle v. United States*, 33 Ct. Cl. 1, 27 (1897), upon which the government extensively relied in both the trial court and the court of appeals. The Opposition's partial quotation of the sentence containing this language from the Federal Circuit opinion (Opp. at 8) omits the language without indicating an ellipsis, and thus is somewhat misleading.

[4] The Opposition also seems to argue that the lost profit damages were not recoverable because the texts of the contracts do not provide for them. Opp. at 7. But there is no rule, in the Federal Circuit or anywhere else, that the only damages allowable are those provided for in the contract. Indeed, as this Court remarked in *Globe Refining Co. v. Landa Cotton Co.*, contracting parties "commonly say little or nothing" in the contract about what is to occur in the event of a breach. 190 U.S. 540, 543 (1903). See the Court of Federal Claims opinion at Pet. App. 41a-42a.

recoverable at the time the contract in the case was formed." This assertion (made for the first time here and not supported by any evidence) misunderstands the function of the foreseeability doctrine, which is to serve as a test of whether the breach is the proximate cause of the injury, not as an assessment of the right or likelihood of recovery. *See* 5 Arthur Linton Corbin, *Corbin on Contracts* § 1009 (2d ed. 1964) ("[I]n general damages are awarded for a breach not because they were contemplated and promised to be paid, but to compensate the injured party for harm done that ought to have been foreseen whether it was or not."). The government's reliance in this connection on *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 544 (1903), is unavailing. That case holds that, particularly given the plaintiff's failure to amend its pleading despite the opportunity, the existing pleading did not allege that sufficient notice had been given to the defendant at the time of contracting to warrant special damages. 190 U.S. at 544-46. The portion quoted by the Opposition is out of context, which is a discussion of what the parties can be said to have assumed about the injury that would in fact flow from a breach (and is followed by a fact-intensive discussion of the circumstances of that case; *id.* at 545-46). Neither there nor anywhere else does the opinion even discuss the possibility of any limitation of the liability of a breaching party because of assumptions made by the contracting parties about the state of the law of damages at the time of contracting.

A broader defect in this argument is that the flat rule created by the court of appeals could not have been anticipated because it had never been clearly expressed in the earlier cases of the Court of Claims and the Federal Circuit. The opinions in the earlier cases discuss the supposed "remoteness," "speculation," or "uncertainty" of damages in terms suggesting that they are fact-specific analyses rather than rules of law. *E.g., Myerle v. United*

States, 33 Ct. Cl. 1, 26 (1897); *Northern Helex v. United States,* 524 F.2d 707, 720-21 (Ct. Cl. 1975), *cert. denied,* 429 U.S. 866 (1976).[5] Both Wells Fargo and Judge Smith (who, as the Chief Judge of the Court of Federal Claims, is as knowledgeable as anyone about the state of the law of contract claims against the United States) thought that such was the case. *See* Pet. App. 52a n.11.

Even in the present case, the Federal Circuit opinion fails to be explicit about the scope of its holding. That court not only simply ignores the findings of fact and supporting evidence on foreseeability of damages, but also goes so far as to say that "[T]he Court of Claims awarded damages for the profits Wells Fargo *allegedly* would have made on the additional loans it could have made if the guarantee had issued." Pet. App. 20a (emphasis added) (see Pet. at 15-16, n.6). As noted in the Petition (*id.*), by this pretense that allegations, rather than factfindings backed by evidence, were all Wells Fargo could offer to support its position, the court of appeals opinion avoids coming to grips with the implications of its opinion and stresses how irrelevant and inconvenient to the Federal Circuit are the actual evidence of factual foreseeability and the uncontroverted findings of the Court of Federal Claims.

Petitioner therefore submits that an additional reason supporting certiorari is the need for clarification of the law in general (among other purposes, to enlighten future litigants), which clarification the court of appeals—perhaps unwilling to acknowledge the starkness of its departure from the otherwise universally recognized rule—seems reluctant to provide.[6]

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[5] Indeed, in opposing certiorari in *Northern Helex,* the government argued that the Court of Claims decision there was limited to the specific facts of the case and that the foreseeability issue was "not relevant" to the decision. *Northern Helex,* No. 75-1425, Brief for the United States in Opposition, filed July 14, 1976, at 6.

[6] Similarly, the Opposition asserts that Wells Fargo's claim for lost profits is a matter solely of "speculation" and so must be

4. In an argument that clearly misapprehends the meaning of this Court's cases such as *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996), *Perry*, and *Lynch v. United States*, 292 U.S. 571 (1934), the government complains that the Petition relies on state-law cases to show the conflict between the rule adopted by the Federal Circuit and the law generally. Opp. at 9-10. But the purpose of this Court's holdings is to render the United States subject to the same rights and obligations as apply to private citizens of the United States. *E.g. United States v. Bostwick*, 94 U.S. 53, 66 (1877). The doctrine applies when the United States "comes down from its position of sovereignty and enters the domain of commerce. . . ." *Cooke v. United States*, 91 U.S. 389, 398 (1875). Of course citizens of the United States, when they enter contracts, are governed by state law, and there is little, if any, "federal common law" (Opp. at 9-10) that applies to such transactions. Therefore it is that general state-generated contract law to which the United States is subject when it enters contracts—as, indeed, is shown by this Court's repeated citation of the Restatement of Contracts in its *Winstar* opinion (116 S. Ct. at 2456, 2460 n.30, 2461 n.32, 2465, 2469, 2471).[7] Indeed, the "federal common-

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denied. Opp. at 9. This argument also (as does the Federal Circuit opinion) completely ignores the trial, the evidence, and the findings of fact of the Court of Federal Claims. These matters are not "speculation" but instead are findings of fact based on evidence. Pet. App. 28a-38a. Not only is there no claim that the findings are clearly erroneous, there is no claim that they are erroneous at all. The government, like the court of appeals, pretends that the evidence and findings do not exist. Under the government's view, any attempt to reconstruct what would have happened in the absence of a breach is fatally speculative. Thus no claim for lost profits or earnings could ever be allowed, regardless of foreseeability, and wrongdoers would not be legally responsible for the damage they caused. *See* Pet. at 21-22.

[7] Regardless of whether that law applies to contracts to which the federal government is a party is fundamentally federal, in the absence of some overriding federal interest, such as a need for

law principles" to which the Opposition refers (by its reference, at 10, to pages of the court of appeals opinion) consists of nothing but Federal Circuit and Court of Claims holdings. Acceptance of this view would stand this Court's holdings on their heads.[8]

5. The Opposition asserts that the Federal Circuit opinion did not conflict with this Court's decisions when it declined to award damages because "attempting to determine what could have happened if the guarantee had been issued necessarily involves a highly speculative and conjectural inquiry." Opp. at 10. The government argues that the damage principles expressed in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), and *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), relied on in the Petition (at 21-22), are inapplicable here because they involve antitrust law, not contracts.

The argument is well wide of the mark. It is merely a government *ipse dixit* that greater certainty is required in the proof of damages for breach of a contract than in the proof of damages for antitrust violations. Moreover, the

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uniformity, the federal government generally chooses state law to apply to such transactions. *See United States v. Yazell*, 382 U.S. 341 (1966). Here, as shown by the long train of cases of which *Winstar* is the most recent, this Court has found compelling policy reasons favoring application of state law, which, as we have seen, appears in any event to be uniform in its application of the foreseeability rule in contract damage issues.

[8] The Opposition (at 6) also refers to *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1903), as an instance of "federal common law" that supports its position. As we have shown above, that case does not support the government's position on the merits at all. It is also noteworthy that *Globe Refining* was a diversity case, and the power to create "federal common law" in such cases rested upon *Swift v. Tyson*, 41 U.S. 1 (1842), which, of course, was overruled in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Thus this citation of *Globe Refining* is somewhat perplexing.

policy of refusing to permit the breaching party to benefit from the uncertainty caused by its breach, expressed in *Bigelow* and *Story Parchment*, is just as strong in contract cases. This Court has held that in a breach of contract case, while it is necessary to prove the *fact* of damage, as to the *amount* of damage it is merely necessary to show a basis for a reasoned conclusion. *Palmer v. Connecticut Ry. & Lighting Co.*, 311 U.S. 544, 561 (1941). The Court of Claims itself has recognized this principle. *See, e.g., Specialty Assembling & Packing Co. v. United States*, 355 F.2d 554, 572 (Ct. Cl. 1966) ("It is enough if the evidence adduced is sufficient to enable a court or jury to make a fair and reasonable approximation. . . ."); *Locke v. United States*, 283 F.2d 521, 524 (Ct. Cl. 1960) ("Certainty is sufficient if the evidence adduced enables the court to make a fair and reasonable approximation of damages."). The general law is exactly in accord with the view in the Petition. "The defendant who has wrongfully broken a contract should not be permitted to reap advantage from his own wrong by insisting on proof which by reason of his breach is unobtainable." *Id.; see also* Restatement (Second) of Contracts § 352.

6. The Opposition says that even though the Federal Circuit stated, in *Northern Helex Co.*, 524 F.2d at 720, that its rule against consequential damages applied "especially . . . in suits against the United States," nothing in the subsequent analysis in that court's decision suggests that it "adopted a special rule applicable only to the United States." Opp. at 9 n.6. But as we have shown, the Federal Circuit's doctrine is a special rule applicable to the United States alone. Thus the government's observation serves to underscore that neither the Federal Circuit nor its predecessor has ever explained (nor does the Opposition explain) what justifies the departure of the law of damages available against the United States from that applicable everywhere else. As we pointed out in the Petition (at 17 n.8), the court's remark in *Northern Helex*

that this limitation on damages existed at common law is erroneous, and this has not been challenged by the federal government.[9] The government also does not challenge our showing (Pet. at 20-21), based in the *Winstar* plurality opinion, that if the policy behind this unique limitation is the apparent one of saving money for the government, it is ineffective and self-defeating. For all that appears from the Federal Circuit's opinions and the government's brief, there is no basis or rationale for the rule. That fact alone warrants certiorari.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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[9] It is also undisputed that the Court of Claims was aware as early as its decision in *Ramsey v. United States*, 101 F. Supp. 353, 357 n.1 (Ct. Cl. 1951), (see Pet. at 17-18 n.8) that the limitation on damages with which it favors the United States did not apply in "numerous" state courts, but declined to provide any justification for this disparity.